

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

"BABY L.", a minor, by and
through her legal guardians and
next friends, DOE 1 and DOE 2,
et al.,

Plaintiffs,

vs.

CIVIL NO.: 3:20-CV-00009
February 26, 2020
Lynchburg, Virginia
SEALED TRO HEARING
(Conference Call)

DR. MARK ESPER, in his official
capacity as Secretary for the
United States Department of
Defense, et al.,

Before:
HONORABLE NORMAN K. MOON
UNITED STATES DISTRICT JUDGE
WESTERN DISTRICT OF VIRGINIA

Defendants.

APPEARANCES:

For the Plaintiffs:

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PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY; TRANSCRIPT
PRODUCED BY COMPUTER.

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1 (Proceedings commenced 3:17 p.m.)

2 THE CLERK: Good afternoon. This is the case of
3 Baby L, a minor, v. Dr. Mark Esper and others, Case Number
4 3:20-CV-00009.

5 Could you please state your name as who is on the
6 line.

7 MS. WYER: This is Kathryn Wyer with the Department
8 of Justice.

9 MR. HAAS: This is Alexander Haas with the
10 Department of Justice.

11 MR. BUBAR: Dan Bubar with the United States
12 Attorney's Office, Western District of Virginia.

13 MS. ROTTENBORN: Laura Rottenborn, United States
14 Attorney's Office.

15 THE REPORTER: Mary Butenschoen, the court
16 reporter.

17 THE COURT: Mr. Mast is here in my office. This is
18 Judge Moon.

19 First of all, Mr. Mast, I have a couple of
20 questions. Why is this getting to us this afternoon? It
21 looks from all of the papers, it looks like this situation was
22 known of a long time.

23 (Interruption by court reporter.)

24 MR. MAST: This has been going on for a little while
25 now. We have been at work as much as we could within the

1 system to --

2 THE COURT: No, but, I mean, the hearing to point
3 why wasn't it brought to the Court sooner than an hour or two
4 ago, a couple hours?

5 MR. MAST: Because the -- we've been engaging in all
6 efforts to work within the system, work within the DoD system
7 through our plaintiff, DOE 1's connections in DoD and the US
8 Supreme Court. We brought it today because we received --
9 we've never been able to talk with Department of Defense or
10 Department of State presuming that they were acting in good --
11 well, that DoD at least was acting in good faith. DoD agency
12 initiated parole Visa request as early as February 11, so we
13 were giving it time to play out. And we again found out that
14 Department of State or actors with the Department of State
15 were planning to release her at 1 a.m. Eastern tomorrow
16 morning to ICRC and there was no --

17 THE COURT: And when did you learn that?

18 MR. MAST: I learned that early this morning.

19 THE COURT: Okay. What proceedings did you go
20 through with the government or with the Department of Defense?

21 MR. MAST: So the -- well, DOE 1 I presume -- how
22 would you like me to refer to the plaintiffs?

23 THE COURT: That's fine.

24 MR. MAST: DOE 1 was in [REDACTED]. He sought
25 permission from his chain of command to advocate on her behalf

1 to seek a path to the United States for her to get medical
2 treatment. She has a skull fracture. She has secondary burns
3 to the face. She has an extreme fracture of a hip and femur.
4 And as the orphan child of [REDACTED] terrorists, he correctly
5 anticipated that there would be prejudice and bias against her
6 within the system in [REDACTED] and the fact that the [REDACTED]
7 cannot take children under the age of three. She was pushed.
8 [REDACTED] had asked the [REDACTED] Customs to take her. They
9 declined and said we can't take care of a child that young.

10 So our Doe client sought permission from the [REDACTED]
11 [REDACTED]. He obtained that and he, in the path to treatment
12 in the United States, sought sole legal custody in [REDACTED]
13 because of his residence in [REDACTED]. He was present in
14 [REDACTED] at the time with the child. The J&DR court and
15 the circuit court in his county of residence assessed all the
16 factors in which the Court has, and the court record has been
17 supplemented since then, and --

18 (Interruption by the court reporter.)

19 MR. MAST: So he sought custody of the child to act
20 in her best interest because there was no best interest of the
21 child, analysis that had been undertaken. And so he received
22 that order from the J&DR court in his county of residence, and
23 he then sought to create the legal pathway that was necessary
24 to bring her here for treatment.

25 And he had also advocated up through different

1 contacts to the Vice President's office. The vice president's
2 office reached out -- and forgive me if I'm jumping around.
3 Reached out and sought -- and said to [REDACTED], which is US Forces
4 [REDACTED], and to [REDACTED], US Embassy [REDACTED]. [REDACTED] is
5 [REDACTED] in [REDACTED]. And she was due to be
6 handed over initially when our client found out and he secured
7 a directive from the Vice President's office saying make every
8 effort to get her to the United States.

9 THE COURT: So that's not a legal proceeding,
10 though. The Vice President, how does he fit into chain of
11 command?

12 MR. MAST: Through the Vice President's office as
13 part of the Executive Office of the President.

14 THE COURT: But that's just using influence as
15 opposed to --

16 MR. MAST: That was influence at that point,
17 correct, sir.

18 THE COURT: Was there any legal proceeding he should
19 have gone through? That's what I'm sort of getting at. Was
20 there some sort of administrative proceeding that your client
21 needed to go through with the Army?

22 MR. MAST: He did, Your Honor. He sought -- so
23 after getting clearance from his direct supervisor who is in
24 the JAG shop in [REDACTED], in [REDACTED], he sought custody here
25 in [REDACTED]. They granted that. He sought a record of

1 foreign birth. And then when he received these, whenever he
2 received these, he notified DoD, notified [REDACTED] and notified
3 [REDACTED] at the time. And so they have all had notice that this
4 was a pathway to treatment in the US was being sought by our
5 Doe client.

6 And so [REDACTED] was on board after the Vice President's
7 office had made every effort to intervene to get her here to
8 the United States.

9 THE COURT: The Court -- I'm interested in whether
10 it was an administrative process, not so much who knew -- who
11 shot John, who knew whom. I want to be sure that he's done
12 everything, if there would be any procedure that he should
13 have gone through legally.

14 MR. MAST: He did, Your Honor. And so in seeking --
15 so he would otherwise be a stranger to her except that he had
16 met with her, sought to establish a relationship, sought
17 approval of the direct [REDACTED], and everyone was on
18 board at that point of bringing her to the United States.

19 And so in order to act on her behalf legally he had
20 to -- to have standing to do that. The [REDACTED] courts found
21 that standing under UCCJEA and that it was appropriate. I
22 believe we have a copy of the order there.

23 THE COURT: Well, has he gone through the Secretary
24 of Defense? I mean, whatever --

25 MR. MAST: The Department of Defense, Your Honor.

1 Through that gears the defense, it's the -- the acronym is
2 escaping me, but it's the system that -- that they put
3 [REDACTED] through that system.
4 And so he provided notice to the chain of command; notice to
5 the Department of Defense. The Department of Defense issued a
6 [REDACTED], approved her for treatment under [REDACTED],
7 and based on that -- and approved. I mean, so everything was
8 paid for, including tomorrow's appointment at [REDACTED] for her.
9 And he made repeated requests saying I've got her approved as
10 a [REDACTED], I need her to be moved, and those requests have
11 been made to DoD, and [REDACTED] has had knowledge of that.

12 THE COURT: Was there any procedure he should have
13 followed? When was he notified that his interest in the child
14 was not being recognized?

15 MR. MAST: So he was -- I'm sorry. So he foresaw --
16 he saw the writing on the wall that [REDACTED] was not going to take
17 and invest in taboo child standard. He sought a legal pathway
18 by getting custody.

19 THE COURT: I understand that. But once he gets
20 custody or he wants to get the child out of [REDACTED] back
21 to [REDACTED], when did he know that he would be brought and by
22 whom?

23 MR. MAST: It's uncertain as to when the specific
24 time because we have had no communication regarding this.
25 It's been through second channels. So it's a one-way line of

1 communications, And here's my [REDACTED], I want her to be
2 moved, and we get no response. So this was in -- everything
3 was on track for her to be moved at [REDACTED] of 2019. And
4 DoD had reached -- I'm sorry, [REDACTED] had reached out to
5 [REDACTED], who had requested a waiver of jurisdiction,
6 and it was on his desk to be signed. A courtesy call was made
7 to International Committee of the Red Cross by one of the
8 staff captains there in [REDACTED]. And he said this is a courtesy
9 call, and then they immediately came out with, oh, we think
10 we've found her relative.

11 So prior to November, so between October and
12 November the [REDACTED] was in the lead. Their goal was to bring
13 her to the states as well. They were acting as if the rights
14 get secured under the [REDACTED] court jurisdiction mattered,
15 and then they stopped. The process came to a halt, and she
16 was -- she was left in limbo. And so --

17 THE COURT: When was that?

18 MR. MAST: That would have been since the -- two
19 days before [REDACTED], so that's November the 25-ish,
20 around the November 25 timeline. So she was due to be flown
21 out within 48 hours. That was put on hold. The president did
22 not -- [REDACTED] did not say no, but he said we're going
23 to defer decision until after the election results were
24 satisfied. So we have this anonymous claimant.

25 Plaintiff Doe reached out to ICRC saying I want to

1 make this anonymous claimant aware that we've established a
2 path to US citizenship -- or not citizenship, but the US
3 treatment. And ICRC notified [REDACTED], and [REDACTED]
4 [REDACTED] in December approached Major General [REDACTED]
5 and was very upset that our Doe client was advocating on her
6 behalf and basically retook the reins from [REDACTED]. It was prior
7 to that point, so from the 6th of November custody to early
8 December, everyone in [REDACTED] was acting consistent with the
9 child's best interest and consistent with our Doe client's
10 wishes.

11 And when she did that, she had a conversation with
12 General [REDACTED], and the result of that conversation was [REDACTED]
13 was back in the lead, whereas they said we won't oppose it,
14 but let [REDACTED] be the lead. And she convinced him to give an
15 order, a gag order, to all [REDACTED] personnel talking about Baby
16 L's case and an order that no one can advocate on her behalf.
17 And so from December to now we've been continuing to lobby
18 through contacts. And we have persisted and requested that
19 they respect the custody rights.

20 February 10 we found out that they were due to fly
21 her out, and we had to send a demand letter at that point.
22 And so, again, they have never notified us or given us a
23 chance to discuss her situation and protect our client's
24 rights. Again, it's a surprise we're flying her out at 1
25 a.m., and that's coming through back channels.

1 THE COURT: Well, you were told February the 10th
2 you knew they were going to one day fly her out, right?

3 MR. MAST: We received word that DoD had placed a
4 hold on her transfer and I had spoken with lawyers from DoD.
5 I spoke with Ryan Newman, and we were still confident that --
6 we felt fairly good that, in light of them placing a hold, in
7 light of DoD initiating a parole Visa, an agency initiated
8 parole Visa, we still thought there was an opportunity to work
9 together. Because we're sensitive to the national security
10 interests that are here and we have no desire to -- you know,
11 we don't want to cause harm to those interests, but we think
12 those can still be secured. We just want a TRO on her being
13 removed without their permission, and we think that there's a
14 pathway to resolve her case in the interest of justice in a
15 way that respects the best interest of the child.

16 THE COURT: Well, is there any legal decision you
17 have, case law, that would support the position that you will
18 -- you have to establish that you're likely to prevail.

19 MR. MAST: Yes, sir.

20 THE COURT: TRO is not going to be the end of it,
21 so --

22 MR. MAST: No, and we think can prevail. We've seen
23 with *Boumediene* and with *Hamdi* that even these adult
24 terrorists have due process rights. In fact, committees
25 evaluate their case. And here we have an orphan infant girl

1 who [REDACTED]
2 [REDACTED]. And we think there's a pathway to -- I think
3 that we're likely to prevail on the merits at the end of the
4 day. Can't take a minor child who a plaintiff has -- in this
5 case our client has done everything right, and he's provided
6 notice and he's acted with the knowledge and consent of the
7 [REDACTED], and he's gone through the DoD process to
8 establish [REDACTED], and he's continually notified -- I mean,
9 there have been hundreds of emails. And the [REDACTED] and [REDACTED] have
10 long known about this, and they have just simply refused, and
11 they have treated these rights as a nullity and saying that
12 these Court decisions don't matter.

13 So we're not saying that -- we're saying that she
14 need to be vetted for DNA family ties. They need to be vetted
15 for [REDACTED] terrorist ties, because it is unconscionable to
16 turn over a six-month old female to random claimants that the
17 US government has not satisfied -- or have not even done the
18 due diligence. There is hundreds of pages of classified
19 documents that support this position. There's 150 pages of
20 declassified documents that support this position. And we
21 have -- they just can't simply wave a magic wand and say no
22 due process for you because we don't like the fact that you've
23 established legal custody.

24 And so we're prepared to address that in two weeks,
25 but we need to preserve the status quo so that we can do that

1 so this little girl is not condemned to suffer --

2 THE COURT: Well, it seems, though, that the
3 emergency here is caused by your delay. I mean, you could
4 have -- you knew this day was coming.

5 MR. MAST: Respectfully, Your Honor, I would
6 disagree. We have had -- we've just been given no
7 information.

8 THE COURT: Well, that's enough. I mean, when
9 you're told -- you were told that on the 10th, you got
10 negative information then which would have indicated --

11 MR. MAST: We were still under the impression that
12 DoD was working and that they had initiated a parole Visa
13 request. Up until last night we were still -- we were still
14 hopeful that DoD was on our side, but we came to the
15 conclusion --

16 THE COURT: Well, just like in any other case, you
17 can't hope you're going to settle the case and let the statute
18 run. I mean, this is not a -- it's not that type of case,
19 but, I mean, I have had people working on this all morning
20 long. We had other stuff to do. You picked a crucial time in
21 court. You filed hundreds of pages of documents and expect us
22 to read them in an hour. I mean, that's not very respectful
23 of the Court's time. I mean, you can't just walk in anywhere
24 that I know of and demand that type of attention. I mean,
25 there is responsibility, and it's not...

1 Who would like to respond right now? I would like
2 to let Mr. Mast off the hook right now and see what objections
3 there are to the TRO.

4 MS. WYER: Yes, Your Honor. This is Kathryn Wyer
5 with the Department of Justice for the defendants.

6 The situation from our perspective is that the [REDACTED]
7 did get this custody order in the state court. But as
8 plaintiffs' counsel just acknowledged, that was premised on
9 the understanding that the government of [REDACTED] would
10 issue a waiver of its jurisdiction, and that has never
11 happened.

12 This child is in -- has been under medical care in
13 [REDACTED], [REDACTED], because she was found on the [REDACTED]
14 there, but she is in [REDACTED], and it's really the
15 government of [REDACTED] that has the authority over her.
16 And at this point it has requested that the United States
17 return her to them because they have identified a relative
18 that they want to reunite her with and that transfer -- you
19 know, it's important for the United States to meet its
20 international obligations, and so that is what the United
21 States was planning to do here.

22 THE COURT: Well, Mr. Mast says that what his client
23 is interested in is being sure that this person who is seeking
24 custody of the child is a proper person for the child to be
25 returned to.

1 MS. WYER: And that's really something that's within
2 [REDACTED] authority to determine. We can't under
3 international law impose that -- we can't tell the government
4 of the [REDACTED] how to go about doing that, and it has gone
5 through its process to determine that.

6 The International Red Cross has been involved in
7 this determination, and our understanding is that it has -- it
8 made a final determination on that point and it made a request
9 to us based on that to return the child to them.

10 THE COURT: What did the International Red Cross do?

11 MS. WYER: Well, their role, one of their major
12 missions is to reunite families that are separated during
13 wartime, so that has played a role as it normally does in
14 assisting and identifying relatives. And, you know, it has
15 been involved throughout the process.

16 THE COURT: Okay. All right. Anything else?

17 MS. WYER: Well, we -- I mean, I could mention that,
18 for example, there's no -- there's no proper habeas
19 jurisdiction here because the child is in [REDACTED], and
20 there's no habeas jurisdiction at [REDACTED] Under [REDACTED]
21 [REDACTED] [REDACTED] DC circuit decision, the Court --

22 THE COURT: Well, do you have any authority, I mean,
23 like this where you have a state custody order? I would think
24 this would be rather unique situation.

25 MS. WYER: It is unique because under -- usually

1 these kinds of international custody or adoption issues are
2 handled under the Uniform Custody Act that states have enacted
3 which kind of take into account international law, and they
4 are between foreign governments and private individuals in the
5 United States. But here I guess the complicated factor is
6 that DoD happened to be -- have custody of the child because
7 it was providing medical treatment.

8 But at the same time, under that uniform law, the
9 state court is not supposed to exercise jurisdiction over a
10 child unless the foreign government has authorized it. And
11 here that's what that jurisdictional waiver means. Since the
12 government of [REDACTED] did not waive its jurisdiction, the
13 state -- the [REDACTED] state court did not really have proper
14 jurisdiction as the home state of a child to issue a custody
15 order.

16 And in any event, because it doesn't have
17 jurisdiction over the United States, our obligations, the
18 United States' obligations towards [REDACTED] can't really be
19 impacted by what -- by that order. So I -- the DoD is in the
20 position of having to fulfill its international obligations
21 here, and so that -- it's really kind of -- it's trying to do
22 that because it's very important that we meet our obligations.
23 The State Department thinks that this is a proper course of
24 action, and that's what the government here wants to do.

25 THE COURT: Have you examined the state court

1 proceedings?

2 MS. WYER: Well, we are aware of the order. It's a
3 sealed proceeding so we -- we don't have access to it.

4 THE COURT: But my question is: Did the judge take
5 up whether [REDACTED] had waived its rights in the situation?

6 MS. WYER: Yes. I think what happened there is that
7 the [REDACTED] believed that the government of [REDACTED] was
8 going to waive jurisdiction, and that's what they told the
9 Court, and the Court kind of prematurely issued an order based
10 on the understanding that was going to happen. And that's
11 what it says in the order, that it anticipates the government
12 is going to do that.

13 As the plaintiffs' counsel just explained, they
14 thought that this was going to happen after the [REDACTED]
15 [REDACTED], but then, ultimately, it never did happen. So that
16 order, that state court order, was issued based on a false
17 premise that has never happened. And now the government
18 has -- of [REDACTED] has determined that it's not going to
19 waive jurisdiction because it has located that relative and
20 now it intends to reunite the family.

21 THE COURT: I'm looking at the order.

22 It says, "Evidence was provided that through the
23 [REDACTED] after consultation with the [REDACTED]
24 [REDACTED] has indicated
25 that it will issue a medical/responsibility/jurisdiction

1 waiver to consent to the US acting in the best interest of the
2 child as a refugee requesting asylum."

3 That's the finding of the court in that case.

4 MS. WYER: Really, under international law, the home
5 state -- I mean, the [REDACTED] court did not have jurisdiction
6 to issue any order unless it properly qualified as the home
7 state or an exception applied. And, I mean, it shouldn't
8 really have acted prematurely based on that understanding
9 unless the waiver had actually been issued. It was still, we
10 think, improper for it to go ahead with that order.

11 MR. HAAS: And its findings said it will issue, not
12 that it had issued.

13 THE COURT: Right.

14 All right. Mr. Mast, would you like to respond?

15 MR. MAST: Yes. Thank you, sir.

16 All of the available intelligence that we have
17 indicates that these are foreign fighters, not citizens of
18 [REDACTED], and their tactics -- their trainings, tactics,
19 and procedures indicated they move every 30 days. There are
20 several countries in the region. The evidence strongly
21 indicates that they are associated with the [REDACTED]
22 [REDACTED], and as foreigners to [REDACTED] they are --
23 this would be improper to -- the request to -- the request for
24 waiver of jurisdiction was primarily a face saving means of
25 allowing the [REDACTED] to defer jurisdiction for political

1 expediency given the elections. And the intelligence
2 supporting that waiver request, which [REDACTED] made and which [REDACTED]
3 has opposed throughout this process, was very strong. I mean,
4 we would not be saying if American jihadists were killed on a
5 [REDACTED] and an American baby was recovered, that because
6 baby was found in [REDACTED] that they had jurisdiction.
7 This was a face saving means to allow them to waive
8 jurisdiction or to simply consent in the best interest of the
9 child.

10 Under UCCJEA, if there's no country that has
11 jurisdiction, and if you look at the record and the
12 intelligence that we have, there is strong evidence that no
13 country had jurisdiction over this because as illegal
14 jihadists that have either come out of [REDACTED] through
15 [REDACTED], none of them would have had citizenship and they
16 would have had no citizenship to pass on.

17 Alternatively, if they retained citizenship then
18 they would still be citizens of the country from which they
19 came, in which case the child shouldn't have just been punted
20 to the [REDACTED] just because we found her in the rurals of
21 [REDACTED], but because, you know, she was -- all of the
22 intelligence indicates that they are a migratory jihadist
23 group who are citizens of no country.

24 So the courts, [REDACTED] courts, considered
25 UCCJEA, and where the strong evidence was that there was no

1 country that actually had home jurisdiction, it had
2 jurisdiction to act, and it had -- you know, where there
3 are -- there's the savings clause under UCCJEA that addresses
4 if it would violate fundamental human rights. And to take a
5 six-month -- well, now a six-month old, then a two-month
6 old -- orphan female child in country this where there's no
7 reason if there's a plausible means which [REDACTED] supported,
8 which the vice president's office supported, and which [REDACTED]
9 itself said we will not oppose, you be lead to do that, and
10 then say -- the easy way out is [REDACTED] has jurisdiction,
11 where that's not necessarily the case and where the record has
12 not been examined. We would say that's -- that's appropriate
13 to act in the best interest of the child.

14 We acted in the best interest of Haitian refugees,
15 and we conducted a family tracing analysis, and we
16 ultimately -- they received far more due process than she has.
17 So there's the two aspects of Baby L and her due process
18 rights. If terrorist detainees have the right to have a
19 committee look at their case, then surely a baby has the
20 right -- that right as well. But the [REDACTED] courts properly
21 exercised jurisdiction under UCCJEA.

22 THE COURT: Well, I will ask the government, is it
23 your position that the Department of State has determined that
24 the person seeking custody is the relative of this child?

25 MS. WYER: Your Honor, the State Department's

1 position is that under international law it's for the
2 government of [REDACTED] to make that determination. And
3 according to our understanding, the government of [REDACTED]
4 has gone through a vetting process, its own vetting process.
5 It has -- it has identified this individual. It has actually
6 identified the child as an [REDACTED], not at a stateless minor at
7 all. And so in its understanding the child is [REDACTED], the
8 relative is [REDACTED], and it is the government of [REDACTED]
9 position that the child needs to be returned to it for family
10 reunification.

11 I mean, here we're dealing with a child in
12 [REDACTED], a non-US citizen in [REDACTED], and I don't
13 believe that she has her own due process rights under United
14 States law. It's a matter of international law and what is
15 the United States' obligation under international law given
16 that it's only because the United States happened to be
17 [REDACTED] their -- with the consent of the government of
18 [REDACTED] and came into custody of the child just for
19 purposes of providing medical care. Now the government of
20 [REDACTED] has requested that she be reunited with her
21 family.

22 MR. MAST: Your Honor, so when we're dealing with
23 [REDACTED] who are about 40 percent or so of the population of
24 [REDACTED] -- the child was recovered in [REDACTED] conference
25 which has never been under government [REDACTED]

1 [REDACTED] control. They have had multiple power sharing
2 agreements with the [REDACTED] and their leadership. You know,
3 it's an open question as to the full -- the rights of
4 statehood over these areas.

5 But what we do know is that the strength of US
6 intelligence was strong enough that [REDACTED]

7 [REDACTED]
8 [REDACTED]. [REDACTED]. We knew at that
9 time that they were foreign fighters. This would be no
10 different than if we covered an American child that's from
11 American foreign fighters or a British child from them. There
12 would be no claim that [REDACTED] has sovereignty over
13 foreign fighters.

14 THE COURT: Isn't this an individual citizen of the
15 United States? Wouldn't it be an international situation?

16 MR. MAST: Your Honor, it didn't have to be an
17 international situation except that for the bad acts of State
18 Department, [REDACTED], and [REDACTED]. We have word from one of
19 the attendees of that phone conference that there was never an
20 analysis. There was laughing at the best interest of the
21 child in this consideration. And General [REDACTED] said I trust
22 the uncle, and that was one of the -- flippantly dismissed it.
23 The second claim was that the uncle -- well, the first two
24 claims is an uncle had --

25 THE COURT: How do you perceive -- I mean, what --

1 what are you asking for, ultimately? Your client is not
2 asking to adopt the child.

3 MR. MAST: No, sir. He wants to get her medical
4 treatment in the United States because we dispute that this is
5 a family member. We believe that this is [REDACTED]. If it
6 were family, [REDACTED] knows how to immediately go and get their
7 children back from US custody. It happens all the time. We
8 have a doctor who is the [REDACTED] in
9 [REDACTED], [REDACTED], who can testify to this. They
10 routinely run children through there that fall temporarily
11 into US custody. What they will do is use children as human
12 shields. They get injured, they get picked up, they get
13 patched up, and then [REDACTED] knows how to immediately seek
14 custody of them.

15 She's been here 160 days, and that's because -- the
16 only reasonable explanation these foreign [REDACTED] fighters
17 could know that with the [REDACTED] going on right now, they
18 are being officially -- their insistence is being officially
19 denied. There are no [REDACTED] in [REDACTED]. And so the
20 only hope they have is confidentiality through ICRC
21 approaching government -- approaching US through ICRC, which
22 they have, if that's true. And then ICRC coaching the [REDACTED]
23 [REDACTED] also in how to make the
24 request for her to be returned back. And that's, you know,
25 where -- where that's the case, the indications are strong

1 under [REDACTED]. We just want them -- the US to vet them for
2 [REDACTED] ties and to ensure DNA connection. And by making
3 those two simple requests, [REDACTED] will self select
4 themselves out and you will not hear from this supposed family
5 ever again.

6 And so in the meantime she can receive -- she had a
7 [REDACTED]. Her head is [REDACTED]. She has that
8 [REDACTED] on her leg. [REDACTED] is right here ready to treat
9 her. And then any claims for actual relatives that are not
10 [REDACTED] can be addressed here in the United States. They
11 just want to act in her best interest. They created a legal
12 path to do that. It was acquiesced to by DoD. And State said
13 they wouldn't interfere, and they have interfered a lot. And
14 they put her Visa on hold. They told DoD withdraw that agency
15 initiated Visa request. DoD initiated a parole Visa to get
16 her treatment and State -- and [REDACTED] and the others call over
17 and said put it on hold. She could have been here now already
18 if they had just consented to her getting medical treatment.
19 It is absolutely outrageous that the United States government
20 would knowingly close its eyes and say that non-existent
21 screening protocols for under these circumstances ICRC --
22 which has to be in confidentiality. We understand that. They
23 have to be agent for all players, but that is not proof that
24 these are not [REDACTED].

25 Strong evidence is that these are [REDACTED]. And if

1 you look at [REDACTED], despite claims
2 that she's [REDACTED], we think that's not the case. We see child
3 soldiers. We see child suicide bombers. Their specialty is
4 training child [REDACTED]. In all those pictures of little kids,
5 four-year-olds with AKs, and learning how to make suicide
6 vests and so forth. If we give her back to them and they are
7 [REDACTED] and we target them, she's going to die because US is
8 going to kill whoever she's with. If she goes with them as an
9 orphan, she's subject to risk of sexual trafficking and she's
10 subject to risk because of her [REDACTED] of being an
11 ideal suicide bomber.

12 THE COURT: How many children has your organization
13 rescued?

14 MR. MAST: From [REDACTED] this is our first, but
15 we've talked to some of the US lawyers who are in [REDACTED],
16 and they've rescued three. And so we can't save them all, and
17 we're not claiming to, because we respect [REDACTED]
18 sovereignty. But here the circumstances were a clear path for
19 the US to respect [REDACTED] sovereignty and say, All our intel
20 says that she's not [REDACTED]. Are you okay with us getting her
21 medical treatment in the US? Sure, no problem.

22 But ICRC and [REDACTED], it's personal animus
23 where when she found that the vice president's office said
24 make every effort, [REDACTED] said yes, sir, and they made every
25 effort. When she heard that, she said okay, fine, you do it.

1 I won't interfere.

2 When the issue arose of another unvetted claimant
3 where we wanted to offer medical care and she found out, she
4 went running over to the general in charge and says gag order
5 and no one can advocate on their behalf, and they laughed
6 about this. And it's outrageous.

7 THE COURT: For the government, you said several
8 times international law requires that the Department of State
9 turn this child back to [REDACTED]. Can you cite to me
10 chapter and verse what you're relying upon?

11 MS. WYER: I don't -- I don't have a cite that I can
12 provide right now, but that's from the State Department's view
13 of our international obligations. I mean, stemming from, for
14 one thing, the fact that we are in [REDACTED] at all by the
15 consent of the government of [REDACTED], and it's really up
16 to them what happens to a child found in their territory. All
17 of these -- by the same token, what legal authority would
18 allow the United States to impose these requirements on the
19 government of [REDACTED] since that's not the way it handles
20 its vetting? It did its own vetting process. We can't
21 dictate to the government of [REDACTED] how it needs to go
22 about vetting an individual as the relative of the child. And
23 the UCCJEA recognizes that in the first instance by
24 designating one jurisdiction as -- as the proper jurisdiction
25 to make a determination, and here that would have been

1 [REDACTED], not [REDACTED].

2 MR. HAAS: Your Honor, this is Alexander Haas.

3 I would just like to add there is a [REDACTED]
4 [REDACTED] between the United States and [REDACTED]
5 that was concluded in [REDACTED] with the consent of their
6 government and ours, and it reflects an expectation that our
7 Armed Forces will conduct themselves in a manner consistent
8 with [REDACTED] law. In particular, [REDACTED]

9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED] [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]

16 Now, this is a case that concerns the foreign
17 affairs and military interests of the United States, and you
18 had asked Counsel for the Plaintiff what specifically he was
19 asking for. Initially he said that he wanted two weeks to
20 brief this, but it is also clear that he apparently wants the
21 Court to order the United States to take a citizen of another
22 country and return that person to the United States for
23 medical treatment. That would have potentially profound
24 implications on our military and foreign affairs interests and
25 is something that we would urge you not to do.

1 You also asked plaintiff how much notice that he had
2 had, and I would remind the Court that he was aware two weeks
3 ago of what he referred to as the writing on the wall and
4 could have filed this motion then. We don't think given the
5 shortness of time here that it is appropriate for the Court to
6 enter an order enjoining the United States, particularly on
7 the basis of a state court order to which we -- the United
8 States was not provided formal notice under [REDACTED] law.

9 Counsel for the plaintiff said that DoD acquiesced
10 in the order, but we were not given legal notice of that order
11 as is required under [REDACTED] law since we had physical and
12 constructive custody of the child. That would have required
13 the serving of legal process on the Department of Defense,
14 among others, and we have searched and not found any evidence
15 that formal notice was provided.

16 And the notion that a state court order obtained on
17 the basis of what appears to be false or incomplete
18 information would then be used to constrain the foreign policy
19 and military affairs decisions of the United States is deeply
20 concerning.

21 MR. MAST: Your Honor, the [REDACTED]
22 [REDACTED] also says that [REDACTED] may be moved into and
23 out of the country. Duty personnel may be moved into and out
24 of the country without a need to request permission from the
25 government of [REDACTED]. And so --

1 (Interruption by the court reporter.)

2 THE COURT: Isn't this -- couldn't this be in or
3 under immigration?

4 MR. MAST: No, because she is being brought -- and
5 what's what the agency initiative of DoD created. DoD
6 initiated parole Visa means that she could come for the
7 limited purpose of getting medical treatment. So that's with
8 the full knowledge and consent of DoD, that they initiated
9 this parole Visa. It was only put on hold again through
10 State's actions. They said they wouldn't oppose it. And if
11 it was going to be such an international incident, why did
12 [REDACTED] fully support a pathway for her to get there to the
13 United States for medical treatment? So we would say that
14 this has been --

15 THE COURT: Would be no problem if the president of
16 [REDACTED] had agreed to this as recommended to state court
17 that he would.

18 MR. MAST: Your Honor, that was -- and he never has
19 said no. We just simply asked that they ask him, and State
20 has continually said -- they have continually opposed to even
21 ask him. And so they have helped create the situation. They
22 shouldn't benefit from creating these facts.

23 THE COURT: But isn't that an answer when they
24 demand the child back, that the government of [REDACTED]
25 demands the back? Why isn't that your answer?

1 MR. MAST: No, sir. I mean, like we've seen over
2 in [REDACTED], there have been British national children that have
3 identified and removed. They know that they are not [REDACTED].
4 This child is not [REDACTED]. She's from foreign [REDACTED] leaders.
5 And we have [REDACTED]
6 [REDACTED] that we're aware of, and
7 we believe that those -- those give the easy way out to say
8 have they even tried. They didn't even try.

9 THE COURT: If this child should come to the United
10 States and have medical treatment, then the next step would be
11 to ask for asylum in the United States.

12 MR. MAST: It may happen, Your Honor.

13 THE COURT: Well, it would be sort of silly to bring
14 the child here and send her back to [REDACTED].

15 MR. MAST: But a US court could apply law that
16 respects international human rights. We have rights sex-based
17 discrimination that -- and other factors that make it
18 appropriate to apply US law here, especially when she was
19 never in the physical custody of the [REDACTED] government.
20 There is strong evidence that she's foreign and not subject to
21 their jurisdiction. And so if there is evidence of
22 non-[REDACTED] claims who have not pulled an end run on family
23 custodial issues on the [REDACTED],
24 which we think is the case with ICRC's help -- ICRC is not
25 going to disclose whether they are [REDACTED] -- and they are

1 going to represent to [REDACTED], who is relying upon ICRC they have
2 found family, that's just a bare assertion. And so if
3 those -- if she is brought to the United States and if
4 claimants arise and they are vetted, two simple things: DNA
5 test vetting and look at the US intel. Ask them to identify
6 themselves, because if they are not --

7 THE COURT: Is the Court to do that?

8 MR. MAST: No, Your Honor, we want some status quo
9 until the [REDACTED] makes these -- makes this request.

10 THE COURT: Is this Court to order them to do
11 something? That would be their job anyway.

12 MR. MAST: Whose job, Your Honor?

13 MR. MAST: The party you're speaking of to do the
14 vetting.

15 MR. MAST: And that's what we're asking, do your job
16 because --

17 THE COURT: Okay. So they have done whatever and
18 you don't like the result.

19 MR. MAST: No, sir, they haven't done their job.
20 They have not vetted for DNA. They can vet for DNA within
21 four days. They have her DNA on file. They could vet for
22 [REDACTED] by saying we routinely require biometric screening of
23 detainees and others in areas where there's no [REDACTED]
24 activity. If they are [REDACTED], they are not going to
25 identify themselves, and all of our intel says that they are

1 foreign fighters and we sent [REDACTED]

2 [REDACTED] on the strength of that
3 intel. Now we can't say we don't know where the child is
4 from.

5 THE COURT: Does the government have anything else?

6 MS. WYER: Your Honor, we cannot -- the Court just
7 can't require the United States to impose obligations on
8 [REDACTED] that are not in accord with [REDACTED] law. I
9 mean, we --

10 THE COURT: I gather he's asking this Court to
11 impose --

12 MS. WYER: The plaintiffs are essentially --

13 THE COURT: -- United States.

14 MS. WYER: Well, plaintiffs are essentially
15 demanding that the United States impose conditions on the
16 government of [REDACTED] to return a child that the
17 government of [REDACTED] is saying is their citizen and that
18 they have identified this child's family member. They want to
19 reunify the child. This is putting the United States in a
20 very difficult position.

21 THE COURT: Is there any law that requires the
22 United States to do the vetting that Mr. Mast is speaking of?

23 MS. WYER: No, Your Honor. I'm not aware of any law
24 that would require that or even allow it.

25 MR. MAST: Your Honor, it took ten years of that

1 statement of we can't impose obligations of the government of
2 [REDACTED] for US forces to find the moral clarity to stop
3 the practice of pedophilia on US installations with the bacha
4 bazi boys. And it took US personnel getting into fistfights
5 with men who were engaged in the rape of prepubescent boys on
6 US bases in order to finally come to that moral clarity that
7 we get to impose obligations which are consistent with
8 international human rights laws.

9 And in this situation it is inconsistent -- this
10 isn't saying this is a farmer in [REDACTED] that we would
11 absolutely support reunification. What we're saying is this
12 is [REDACTED] training little [REDACTED] to become suicide bombers,
13 and they are pulling the wool over the eyes of our [REDACTED]
14 partners. And we need to mentor and assist, which is what we
15 are continuing to do -- we've been there for 20 years, de
16 facto control on [REDACTED]. We need to assist our partners in
17 vetting in this instance.

18 This is not a recipe for every child who comes into
19 US custody, because this is unique. [REDACTED].
20 You have a picture of her likely father, and we have had two
21 false claimants already that couldn't be identified, or
22 wouldn't be identified. One was [REDACTED] who was in
23 [REDACTED] prison who was the facilitator who said I brought them
24 here. He was not the uncle. Then we have another random
25 claimant that when we say we want to offer you medical

1 treatment, that person magically disappears. If the US, which
2 State Department said they were willing to do, the Vice
3 President's office said make every effort, they made him ask
4 to the president of [REDACTED] to provide a face saving means
5 of providing care for this child. But that has created
6 animosity with the [REDACTED] and she has
7 sabotaged this every step of the way. There was a DoD
8 initiated parole Visa that is at USCIS that [REDACTED]
9 (phonetic) has put on hold at State's request. So if state
10 would just get out of the way, we could have already done
11 this, and there would not be an international incident. And
12 why did DoD support this? But now it's allowing State to take
13 the lead, and this is based on one woman's animus to being
14 gone over her head because she was not respecting
15 international human rights.

16 If you look at State's Twitter and all these other
17 things, they talk about child trafficking, they talk about
18 sexual exploitation, talk about rights for women. And when
19 the rubber meets the road, they just want to wash their hands
20 of a baby.

21 MR. HAAS: Your Honor, this is Alexander Haas again.
22 If I could just say one or two more things.

23 Plaintiffs' counsel says -- has gotten into a lot
24 of, you know, twists and turns here, but sort of circling back
25 to the legal principles. You asked were there things that the

1 plaintiffs could have done. Yes, we know of two now that have
2 not occurred.

3 First, that they requested and did not obtain the
4 consent of the government of [REDACTED] to bring the child
5 here, and plaintiffs' counsel conceded that that was required
6 but has not been obtained.

7 Second, that they have submitted an application for
8 parole of this child to the United States. And again,
9 plaintiff has conceded that has not been granted.

10 There are procedures that have -- that they have
11 attempted to take that have not -- not occurred. And so in
12 the face of that, we don't think there is any legal basis for
13 them to attempt to bring this child here, particularly when
14 the government of a foreign country where our military is
15 present by their consent has requested the repatriation of
16 their citizen.

17 And to ask the Court in a matter of a few hours when
18 they have had notice of this for months and had notice that
19 something was up for several weeks to put a hold on a transfer
20 and order the United States to not -- to halt is a very -- a
21 very stark thing to ask this Court to do on such short notice,
22 given that this involves core Article II powers of the
23 executive branch to conduct our military and foreign affairs.

24 We're deeply concerned about what a message -- what
25 such an order would be saying given the separation of powers.

1 And to do all of this on the basis of what we believe is a
2 deeply flawed and incorrect state court order that could not
3 bind the United States in any event would be -- would be in
4 error, Your Honor.

5 THE COURT: Does the government know or either party
6 know of any citations, particularly in the Fourth Circuit,
7 where a state court were not acting -- the federal court had a
8 situation where the state court were not acting or were acting
9 in excess of their jurisdiction? I assume there probably are
10 situations.

11 MS. WYER: Well, there are certainly cases that make
12 clear that a state court order cannot bind the United States
13 in any event, even if it were a valid order.

14 THE COURT: Well, if the state court though made a
15 decision that -- or gave the plaintiff in this case, allowed
16 the plaintiff to adopt the child even though he's still in
17 [REDACTED], you would have a -- I'm saying the state court
18 did it would be probably in excess of its jurisdiction to do
19 it. Maybe not, I don't know, but...

20 (Interruption by the court reporter.)

21 MR. MAST: Rooker-Feldman Doctrine addresses state
22 court decisions, Your Honor.

23 MR. HAAS: Your Honor, Rooker-Feldman Doctrine is an
24 abstention doctrine that would require the Court to abstain.

25 There are several lines of cases, though, that

1 relate specifically to the -- of the power of state courts to
2 try to bind the United States. And it's been clear since the
3 civil war. There's, you know, the famous case that we all
4 learned in law school, *Tarble's* case -- that's 80 U.S. 397 in
5 1871 -- that explained that state courts cannot issue, for
6 example, writs of habeas corpus when someone is -- quote, Is
7 in the custody under the authority of the United States.

8 And then there's the ordinary sovereign immunity
9 principles that apply. And I direct you to a case called
10 *Smith v. Cromer*. And I acknowledge it is in a different
11 context, it's not a custody issue, but that's 159 F.3d 875,
12 fourth Circuit from 1998. And it held that state court orders
13 seeking to compel action by a federal official was, quote, An
14 action against the United States subject to the governmental
15 privilege of sovereign immunity. And that the -- so that
16 would be another one.

17 THE COURT: Okay, thank you.

18 Does the Department of Justice take the position
19 that the orders of the [REDACTED] courts were unlawful?

20 MS. WYER: Yes, Your Honor. We think they were
21 unlawful for a number of reasons. One of them because the
22 government of [REDACTED] did not waive jurisdiction. And so
23 under the Uniform Custody Law, [REDACTED] should not have been
24 exercising jurisdiction.

25 And I think if you look at the [REDACTED] state law

1 decision [REDACTED], that
2 discusses the proper jurisdiction of a [REDACTED] court to
3 exercise jurisdiction over a custody proceeding. And under --
4 under the home state definition, because [REDACTED] did not
5 qualify as the home state, [REDACTED] should not have been
6 exercising jurisdiction at all here.

7 And also the fact that the [REDACTED] court did not
8 provide notice to DoD when DoD had custody of the child, I
9 mean, if the United States had been involved in that
10 proceeding as it should have been since it had custody, we
11 imagine things would not have gone the same way because we
12 would have been able to correct some of these factual errors
13 that were happening there. So but anyway, in any case, a lack
14 of notice is another basis that we think it is an erroneous
15 decision and can't be binding on the United States.

16 THE COURT: All right. Anything else anyone like to
17 say?

18 Okay. All right. I'm going to try to come to a
19 decision by 5 o'clock. Are you-all going to be available
20 then?

21 MR. HAAS: Yes, Your Honor.

22 THE COURT: All right, because I think depending on
23 what I do decide will be important for you to know.

24 Okay. Why don't we adjourn now. And can we get
25 back on -- can we rearrange this call for 5 o'clock?

1 THE CLERK: Everybody, if you-all dial in the same
2 number at 5 o'clock we'll be on the line.

3 MR. HAAS: Thank you, Your Honor.

4 THE REPORTER: Okay.

5 THE COURT: Thank you.

6 (A recess was taken 4:25 p.m. to 5:08 p.m.)

7 THE CLERK: Do we have everybody on the line from
8 the DOJ, US Attorney's Office?

9 MR. HAAS: This is Alexander Haas from the
10 Department of Justice.

11 MS. WYER: Kathryn Wyer from DOJ is here.

12 MR. BUBAR: Dan Bubar from the US Attorney's Office.

13 MS. ROTTENBORN: Laura Rottenborn, USAO.

14 THE COURT: All right. This is Judge Moon. First I
15 want to thank counsel for your arguments today and for
16 appearing on very short notice.

17 This matter is before the Court on the plaintiffs'
18 motion for a temporary restraining order. Plaintiffs are the
19 one seeking the emergency relief from the Court, and they have
20 to meet the standard articulated by the Supreme Court in
21 *Winter v. Natural Resources Defense Counsel* applicable to
22 motions for preliminary injunctions and TROs.

23 Plaintiffs must show, one, a likelihood of success
24 on the merits that plaintiffs are likely to suffer irreparable
25 harm absent the TRO, the balance of equity is tipped in

1 favor -- plaintiffs' favor, and that issuing the TRO is in the
2 public interest.

3 I've considered plaintiffs' filings today and the
4 argument of counsel. Plaintiffs filed this action and their
5 request for a TRO and dozens of exhibits at 1 o'clock today.
6 The Court heard argument in the case from 3:30 to 4:30. At 5
7 o'clock -- or at 5:06 or 7 now, I think -- the Court is
8 rendering this oral decision.

9 Given the urgent time considerations plaintiffs have
10 described that Baby L would be put on the plane today from
11 [REDACTED] Eastern Standard Time tonight, after
12 consideration of the governing law, arguments, and
13 submissions, I will deny plaintiffs' request for a temporary
14 restraining order. I do not find that plaintiffs have
15 established a likelihood of success on the merits, and, also,
16 I find that the balance of equities do not tip -- as I said,
17 do not tip in favor of the plaintiff, or that the TRO is
18 necessarily in the public interest.

19 Plaintiffs' asserted rights to care for Baby L arise
20 from two [REDACTED] court orders from the Juvenile and Domestic
21 Relations Court of [REDACTED] and the [REDACTED] Circuit Court.
22 But as the government has articulated, these [REDACTED] court
23 orders by their express terms reflect an assumption that the
24 government of [REDACTED] will issue a
25 waiver of jurisdiction. The order from the [REDACTED] Juvenile

1 and Domestic Relations Court states, quote: Evidence was
2 provided that [REDACTED] through the [REDACTED] after
3 after consultation with the [REDACTED]
4 [REDACTED] has indicated that it will
5 issue a medical/responsibility/jurisdiction waiver to consent
6 to the US acting in the best interest of the child as a
7 refugee requesting asylum. The written copy of the waiver is
8 to be provided in a matter of days.

9 [REDACTED] has not issued any waiver of
10 jurisdiction. Instead, as Counsel for the government has
11 asserted today, [REDACTED] is expressly requesting that Baby
12 L be returned under [REDACTED] authority and care.

13 The government has also asserted that as custodian
14 of Baby L Department of Defense should have been formally
15 served with and provided notice of the proceedings in [REDACTED]
16 County Circuit Court. That was not done.

17 The [REDACTED] orders were foundational to plaintiffs'
18 asserted authority to care for Baby L. Given the plain terms
19 of the [REDACTED] court orders and the lack of service and
20 notice upon DoD, I find that plaintiffs have not met their
21 burden of establishing a likelihood of success on the merits.

22 Plaintiffs' likelihood of success on the merits is
23 further diminished by their failure to proceed through proper
24 channels. As the government articulated, plaintiffs' counsel
25 had two alternative avenues to pursuing this 11th hour TRO.

1 First, they should have obtained the consent of the
2 [REDACTED] government to the transfer of Baby L. While
3 plaintiffs' counsel conceded both that it was required and
4 they sought it, it ultimately was not obtained.

5 Second, plaintiffs' counsel also submitted an
6 application for a Visa for this child to enter the US, which,
7 again, plaintiff conceded was not granted.

8 Plaintiffs' failure to succeed under the two avenues
9 demonstrate there's no legal basis to bring Baby L to the
10 United States.

11 Lastly, I cannot overlook the international
12 ramifications of the Court granting the request for temporary
13 restraining order. The State Department has ably articulated
14 the US government's foreign policy interest and has argued
15 relations with [REDACTED] are significantly implicated by
16 this case.

17 Plaintiffs' counsel suggested that if only the State
18 Department would, quote, get out of the way, end of quote,
19 everything would proceed in an orderly fashion and [REDACTED]
20 would respect human rights law. But it is the role of the
21 State Department and not private litigants or the Court to
22 determine the foreign policy interest of the United States.

23 For these reasons, I deny plaintiffs' motion for a
24 TRO.

25 And that's the decision. And anything else?

1 MR. HAAS: Nothing from United States, Your Honor.
2 Thank you very much.

3 (Interruption by court reporter.)

4 MR. MAST: Clarification is that it was a DoD
5 initiated parole Visa. We did not initiate the Visa.

6 THE COURT: Okay. With that correction then, we'll
7 adjourn. Thank you all.

8 COUNSEL: Thank you, Your Honor.

9 (The proceedings concluded at 5:15 p.m.)

10 **CERTIFICATE**

11 I, Mary J. Butenschoen, certify that the foregoing
12 is a correct transcript from the record of proceedings in the
13 above-entitled matter.

14 /S/ Mary J. Butenschoen, RPR, CRR

3/14/2020

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